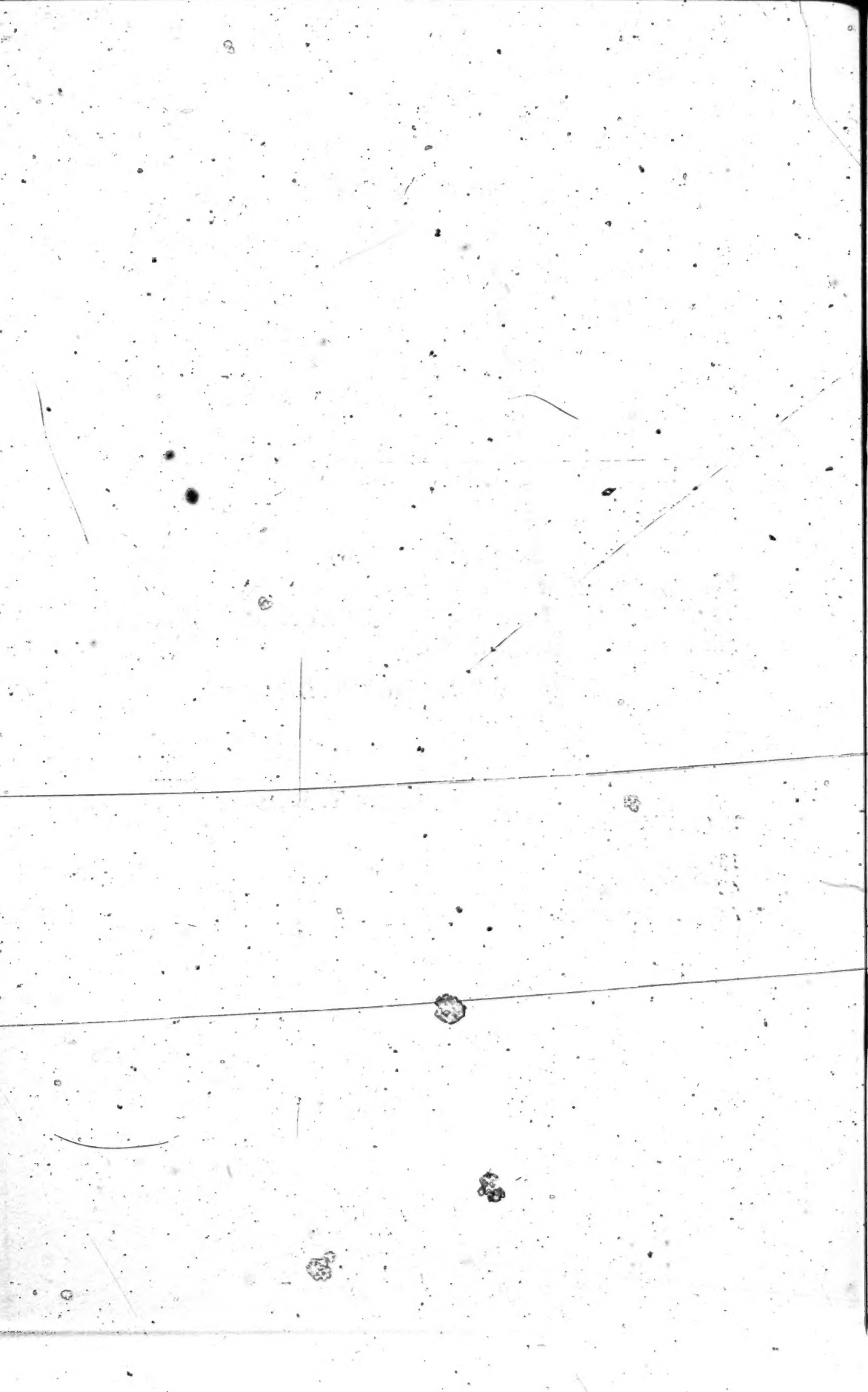

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IN THE

Supreme Court of the United States

No. 70-26

MILLARD GOODING, Warden,

Appellant,

v.

JOHNNY C. WILSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLEE

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INDEX

	Page
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT:	
I. "Opprobrious Words or Abusive Language" Is So Vague and Overbroad as to Violate the Freedom of Speech Guarantee of the First and Fourteenth Amendments	4
II. "Tending to Cause a Breach of the Peace" Is So Vague and Overbroad as to Violate the First and Fourteenth Amendments	10
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:

Ashton v. Kentucky, 384 U.S. 195 . . . . . 9, 11, 14n

Black Planning Committee v. Minchew, ____F.Supp.____, No. 669 (S.D. Ga. September 23, 1970) 3

Bond v. Floyd, 385 U.S. 116 . . . . . 7n, 9

Brandenberg v. Ohio, 395 U.S. 444 9

Cantwell v. Connecticut, 310 U.S. 296 . . . . . 9, 15

Carroll v. President and Commissioners, 393 U.S. 175 . . . . . 14n

Chaplinsky v. New Hampshire, 315 U.S. 568 . . . . . 10, 14, 14n

Coates v. City of Cintinnati, ___ U.S. ___, 91 S.Ct. 1686 . . . . . 91 S.Ct. 1686 . . . . . 10, 10n, 13, 15n

Cohen v. California, ___ U.S. ___, 91 S.Ct. 1780 . . . . . 8, 15

Connally v. General Construction Co., 269 U.S. 385 10

Cox v. Louisiana (I), 379 U.S. 536 . . . . . 9, 11, 12, 13, 14n

Edwards v. South Carolina, 372 U.S. 229 . . . . . 11, 13, 14n

Elmore v. State, 15 Ga. App. 461 (Ga. Ct. App. 1914) 11

Fish v. State, 124 Ga. 416 (Ga. S.Ct. 1905) 6, 10n

Page

Garrison v. Louisiana, 379 U.S. 64 9
Giaccio v. Pennsylvania, 382 U.S. 399 7
Gregory v. City of Chicago, 394 U.S. 111 . . . . . 12, 13, 14n, 15
Gunn v. University Committee, 399 U.S. 383 11
Herndon v. Lowry, 301 U.S. 242 7
Holcombe v. State, 5 Ga. App. 47 (Ga. App. 1908) 5, 7
Jackson v. State, 14 Ga. App. 19 (Ga. Ct. App. 1913) 6, 6n
Jackson v. State, 38 Ga. App. 138 (Ga. Ct. App. 1928) 14
Kennedy v. State, 10 Ga. App. 794 (Ga. Ct. App. 1912) 14
NAACP v. Button, 371 U.S. 415 . . . . . 7, 14n
New York Times Co. v. Sullivan 376 U.S. 254, 270 9
Rich v. State, 160 Ga. 513 (Ga. S.Ct. 1925) 14
Screws v. United States, 325 U.S. 91 7
Schenck v. United States, 294 U.S. 17 13
Shields v. State, 89 Ga. 549 (Ga. S.Ct. 1892) 5, 6, 6n, 7
Shuttlesworth v. City of Birmingham, 392 U.S. 87 14
Smith v. California, 361 U.S. 147 7
Street v. New York, 394 U.S. 576 9
Stromberg v. California, 283 U.S. 359 13
Terminiello v. City of Chicago, 337 U.S. 1 . . . . . 8, 12, 14n, 15
Thomas v. City of Danville, 207 Va. 656, 152 S.E. 265 (Va. S.Ct. App. 1967) 11
Tillman v. United States, 406 F.2d 930 (5th Cir. 1969), cert. den. 395 U.S. 830 3
University Committee to End the War v. Gunn, 289 F.Supp. 469 (W.D. Tex. 1968) 11
Wilson v. Georgia, 390 U.S. 911 2
Wilson v. Gooding, 431 F.2d 855 (5th Cir. 1970) 3
Wilson v. State, 223 Ga. 531 (Ga. S. Ct. 1967) 2, 6, 6n
Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969) (en banc) 14, 15
Wood v. Georgia, 370 U.S. 375 . . . . . 12n

Page

Wright v. City of Montgomery, 406 F.2d 867 (5th Cir. (1969) 11n

Statutes:

Ga. Code Ann. § 26-5304 13

Ga. Code Ann. § 26-6303 . . . . . *passim*

Ga. Code Ann. § 27-2508 14

Model Penal Code § 250.1 . . . . . 15n

Model Penal Code § 250.2 15

Other Authorities:

Carroll, Alice in Wonderland 11

Chase, Blackstone (3rd ed. 1890) 4

IN THE

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v.

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Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether former Section 26-6303, Ga. Code, proscribing the unprovoked use to or of another person and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace, is unconstitutional for vagueness and overbreadth.

STATEMENT

In addition to the appellant's statement, the following are also relevant to the Court's consideration of the issues here presented.

Appellee, JOHNNY C. WILSON, was convicted on February 2, 1967, of all counts of a four-count indictment charging him with two counts of assault and battery (counts 1 and 2) and two counts of opprobrious words or abusive language (counts 3 and 4). Appellee was found by a jury to have said, in regard to count 3, "white son of a bitch, I'll kill you" and "you son of a bitch, I'll choke you to death," and in regard to count 4, "you son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." The persons upon whom appellee committed the assault and battery offenses were the same persons against whom the illegal language was found to have been used. Petitioner was sentenced to serve twelve months (the maximum for a misdemeanor under Georgia law) on each of the counts, with counts 1, 2 and 3 to be served consecutively and count 4 to be served concurrently with count one. Record, *Wilson v. State*, No. 24113, Georgia Supreme Court, at 16 ff.

Appellee's conviction was affirmed upon appeal to the Georgia Supreme Court, *Wilson v. State*, 223 Ga. 531 (1967), and certiorari was denied by this Court, Mr. Justice Douglas dissenting. *Wilson v. Georgia*, 390 U.S. 911 (1968). Prior to the denial of certiorari, inquiry was made from the office of the Supreme Court Clerk as to whether appellee was serving any of his sentences under § 26-6303 concurrently with any of the assault and battery sentences; the answer was, of course, in the affirmative.[1]

Appellee began service of his state sentence on April 15, 1968. On March 5, 1969, he filed a petition for writ of

[1]Telephone conversation between the office of the Supreme Court Clerk and Howard Moore, Jr., counsel for petitioner Wilson, January, 1968.

habeas corpus in the United States District Court for the Northern District of Georgia, the district in which his state conviction was obtained. The petition was granted and petitioner was released upon $1,000 bail on August 11, 1969, into the custody of the United States Marshal. Had appellee not been released by order of the district court, he would have completed service of his state sentences (with appropriate reductions of time for good behavior that he had accrued) some two months later, on October 15, 1969.[2]

Upon his release from state custody, appellee entered upon the service of his federal sentence arising out of the same incident. *Tillman v. United States*, 406 F.2d 930 (5th Cir. 1969), *cert. den.* 395 U.S. 830. On approximately August 10, 1971, appellee was released from custody and is presently on federal probation in West Point, Mississippi.

Subsequent to appellee's release on bail from state custody, the United States Court of Appeals for the Fifth Circuit affirmed the granting of the writ in his favor. *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970). In a civil suit attacking the same statute under which appellee was convicted, a three-judge federal court declared § 26-6303 unconstitutional and enjoined further prosecution thereunder. *Black Planning Committee v. Minchew*, ___ F.Supp. ___, No. 669 (S.D. Ga. September 23, 1970). No appeal was taken from that decision.

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[2]Data as to dates of appellee's incarceration and release time obtained from Georgia State Board of Corrections. Telephone conversation by the undersigned with Records Department, August 23, 1971.

ARGUMENT

I.

"OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE" IS SO VAGUE AND OVERBROAD AS TO VIOLATE THE FREEDOM OF SPEECH GUARANTEE OF THE FIRST AND FOURTEENTH AMENDMENTS.

Georgia Code § 26-6303, under which appellee was convicted and which he successfully challenged in the district court provides in relevant part:

> "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

The operative elements of the statute may quickly be seen as two: "opprobrious words or abusive language," and "tending to cause a breach of the peace." The other terms, "without provocation" and "in his presence" add nothing to the substance of the crime, although they may provide a defendant with means of, in certain limited factual situations, asserting a defense against the application of the statute. But, for a defendant who has not been provoked and who utters his words in the presence of the affected other, a crime cannot have been committed without the utterance of "opprobrious words or abusive language." And, even should the words or language be uttered, no crime can have been committed unless they are words or language "tending to cause a breach of the peace." The two phrases will be discussed separately in the order in which they appear in the statute.

As noted by the district court in granting the writ, ". . . no meaningful attempt has been made [by the courts of the State of Georgia] to limit or properly define these terms [opprobrious words or abusive language]. (App. 10) It must be noted that there is not even a common-law gloss upon the terms—the chapters of Chase's *Blackstone* (3rd ed. 1890) on "Offenses Against Justice" (Ch. VIII) and "Of-

fenses Against the Public Peace" (Ch. IX) do not mention "opprobrious words." Accordingly, both the lower court and the appellant have turned to Webster's dictionary in an attempt to infuse content into the legal definitions. See, App. 10; Brief for the Appellant, 18.

We are accordingly left with definitions of "opprobrious" that include "attaching disgrace, reproachful; scurrilous" (App. 10), "infamous" (Appellant's Brief, 18), and synonyms that include "disgraceful, abusive, insulting, offensive," (App. 10) as well as "words convenying contempt" (Appellant's Brief, 18).

The definitions "abusive" and "opprobrious" represent conclusions of the legislature rather than specific guides to the jury. There is no way of determining whether "abusive" refers to the very nature of a word, or to a misguided application by a speaker. A word used for the highest and most serious of purposes—as during a religious sermon—might equally be construed as "opprobious" when used in the street. Indeed, the preacher himself enjoys the most limited protection. See *Holcombe v. State*, 5 Ga. App. 47, (Ga. App. 1908) (the "big fat rump" case). Under Section 6303, a term completely innocuous in itself might be judged "abusive" when used by a talented speaker of scornful disposition—or when heard by a listener of extraordinary sensitivity.

The vagueness and overbreadth of "opprobrious" and "abusive" has been compounded by the usual treatment of the words by the Georgia appellate courts. With the notable exception of the instant case, the courts have held that it was error for a judge to charge certain words to be opprobrious and abusive as a matter of law; rather, it was up to the jury to make that decision. And, in the few decisions to actually reach the merits of spoken words or phrases, the courts are in conflict and confusion. Thus, by way of example, the court held, in *Shields v. State*, 89 Ga. 549 (Ga. S.Ct. 1892), that "God damn lowdown son of a bitch," was opprobrious and abusive, but not obscene or vulgar, while

but a few years later, it held that it was error for the judge to charge the jury that any particular words are opprobrious or abusive, or to tell the jury that, "God damn you, why don't you get out of the road?" was in violation of the statute. *Fish v. State*, 124 Ga. 416 (Ga. S.Ct. 1905); *Jackson v. State*, 14 Ga. App. 19 (Ga. Ct. App. 1913).

The confusion about whether any particular words are either opprobrious or abusive has been exacerbated by the Georgia Supreme Court decision in appellee's case. *Wilson v. State*, 223 Ga. 531 (Ga. S.Ct. 1967). In that decision, the court said, "The words charged were within themselves opprobrious and abusive [citing *Shields v. State, supra*] and it was not necessary to allege in what manner they were opprobrious and abusive." 156 S.E. 2d 446, 449. The opinion is distinguished by its failure to reconcile or attempt to reconcile the *Shields* doctrine that certain words are opprobrious with the *later* decisions that it is completely a matter for the wisdom of a jury.[3]

The vice of vagueness, when compounded by the absence of standards to prohibit arbitrary and unreasonable enforcement, renders a statute such as Section 6303 susceptible of application when and where the police see fit. Not unnaturally, actions which smack of dissent or unconventionality

[3]The decision, even assuming that in Georgia certain words can be opprobrious *per se*, leaves one in continuing doubt as to the interaction of *Shields* and *Wilson*. Is the speaker henceforth to conclude that "God damn lowdown," used in *Shields* but not in *Wilson* to modify "son of a bitch," was not the cause of the phrase being considered opprobrious and abusive? If plain "God damn you" presents a question for the jury, *Jackson v. State, supra*, can it be that the more ornamented "God damn lowdown" is still opprobrious and abusive *per se*? And what of appellee's use of the word "white" to modify one of his references to the parentage of the officers with whom he was embroiled; does the term "white," in the courts of Georgia, convey any special opprobrium? Would the term "Black;" or, would it matter if the speaker were mistaken as to the racial identity of the person addressed?

are the first to bear its sting.[4] See *NAACP v. Button*, 371 U.S. 415, 432-33, 435 (Court must consider "possible applications of the statute in other factual contexts." *Id.* at 432)

The opinions of the Georgia courts in interpreting Section 6303 "license[s] the jury to create its own standards in each case." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). The statements of the trial judge in the instant criminal trial made it explicit at the trial that all standards were in the hands of the jury. Record, *Wilson v. State*, No. 24113, Georgia Supreme Court, 207-212. Previous decisions under Section 6303 bear this out by expressly authorizing the jury to create its own standards in each individual case. *Holcombe v. State, supra; Shields v. State, supra.*

Definition of crime is the function of the Legislature. But, the exercise of unfettered and unguided discretion by a jury is constitutionally impermissable. *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

That lack of provocation must be proven is not the requirement of willful or knowing unlawful conduct which has been relied upon in sustaining legislation challenged upon vagueness grounds. *Screws v. United States*, 325 U.S. 91 (1945). Proving lack of provocation only goes to the question of willful action or scienter. See *Smith v. California*, 361 U.S. 147 (1959). The statute, by its terms, does not make the crime one of intent, and the vagueness of the terms eliminates any possibility of scienter.

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[4]There is no constitutional dispute about petitioner's assault and battery charges stemming from the same physical incident with the same officers who brought the Section 6303 counts as well. Could the vagueness of Section 6303 have furnished an opportunity to "pile on" charges against a Black SNCC member involved in an anti-war protest? Cf. *Bond v. Floyd*, 385 U.S. 116. When appellee was arrested and charged in August, 1966, Representative Bond was still excluded from the Georgia House, awaiting this Court's December 5, 1966 decision.

The decision of the Georgia Supreme Court in appellee's case renders Section 6303 particularly subject to constitutional attack, for by the court's reading of the statute, words may now be declared illegal *per se*. But, this is exactly the sort of state-imposed cleansing of "public debate" by forbidding particular words that the Court has condemned this past term. *Cohen v. California*, ___ U.S. ___ 91 S.Ct. 1780, 1785. And, just as California had outlawed, by use of the term, "offensive conduct," a vast unknown sweep of words, so too has Georgia limited freedom of expression by its employment of "opprobrious" and "abusive." The record is barren, as it must be, of any evidence that officials in Georgia are more qualified than those in sister states to distinguish one offensive word from another, to recognize that one man's vulgarity is another's lyric, or to make principled distinctions in this area so as to take away from the individual his personal rights in matters of style and taste. Cf. *Cohen, supra*, 91 S.Ct. at 1788.

There seems little doubt that Paul Cohen's vulgar jacket, passing for the moment its auditory lack, would have otherwise qualified as "opprobrious" or "abusive" under the Georgia decisions. And, as such, the statute must fall.

Nor does it require any extension of this Court's holdings to find that making criminal "abusive language" does violence to the First Amendment. After all,

> "... a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4.

There is simply no way for the speaker to know when his speech has gone beyond the protected pale and become "abusive" in the sense that it will subject him to possible

criminal penalties. The result is bound to be a lessening of "uninhibited, robust and wide open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270; *Bond v. Floyd, supra.*

It is firmly settled under the First Amendment that the public expression of ideas may not be prohibited because the ideas are themselves offensive to some of their hearers. *Street v. New York*, 394 U.S. 576, 592. But, how is a Georgia speaker to know when his speech turns from being constitutionally-permissible, although offensive, and becomes, rather, illegal and criminally "abusive." Cf. *Cantwell v. Connecticut*, 310 U.S. 296; *Cox v. Louisiana (I)*, 379 U.S. 536, 462-3.

A long and worthwhile tradition of free speech will be limited and abandoned if a state may impose criminal sanctions upon "abusive" language. Those who are outspoken on issues of the day may always be easily considered abusive by those holding other views, especially if those others have the power of arrest and conviction. Stout-hearted discussion may be intended to influence views, but the First Amendment makes no demand that it be couched in terms to win friends as well. "Maintenance of the opportunity for *free* political discussion is a basic tenet of our constitutional democracy." *Cox v. Louisiana (I), supra*, 379 U.S. at 552 (Emphasis supplied).

It seems certain that the constitutionally protected speeches in *Cox, supra, Brandenberg v. Ohio*, 395 U.S. 444, and *Street, supra*, as well as the caustic criticism in *Ashton v. Kentucky*, 384 U.S. 195, and *Garrison v. Louisiana*, 379 U.S. 64, might be considered by some as "abusive" within the meaning of the Georgia law at issue here. It is hence clearly a statute which fails to draw the necessary and proper distinctions so as to prevent impermissible intrusion upon the freedoms guaranteed by the First Amendment. And, as such, it cannot stand.

The constitutional standard which the courts below have upheld in the instant case is no different from the Court's

recent decision in *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S.Ct. 1686. For the "annoyance" standard of *Coates* one might easily substitute the "opprobrious words or abusive language" of the State of Georgia; the statute here "is unconstitutionally vague because it subjects the exercise of the right of [speech] to an unascertainable standard and unconstitutionally broad because it authorizes the punishment of protected conduct." *Coates, supra*, 91 S.Ct. at 1688. The statute is vague because the standard of conduct which it specifies is uncertain; "men of common intelligence must necessarily guess at its meaning."[5] *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Coates, supra*. For Georgia to have enacted a statute which prohibited "fighting words," and no more would have been acceptable. Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568. But, the prohibition against "opprobrious words and abusive language" defines less and prohibits more. This the state cannot do without trenching upon the First Amendment.

II.

"TENDING TO CAUSE A BREACH OF THE PEACE" IS SO VAGUE AND OVERBROAD AS TO VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Section 6303, the Georgia statute at issue here, does require more than the mere use of "opprobrious words or abusive language" for a violation. The words or language, in addition, must be, "tending to cause a breach of the peace." (App. 3). But, to catalogue what the vaguely proscribed words must do in terms that are no less certain does nothing to cure the statute of its constitutional vices. That

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[5] In Georgia as in Cincinnati there is no certainty "upon whose sensitivity a violation does depend," *Coates, supra*, 91 S.Ct. at 1688, for the courts have either barred certain words or left the whole affair in the hands of a jury. Cf. *Fish v. State, supra; Jackson v. State, supra.*

the vice remains uncured may be further seen from the fact that Georgia courts have, in connection with Section 6303, defined "tending to cause a breach of the peace" in circular terms. Thus, "The words of the statute, 'tending to cause a breach of the peace', are words of description indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute. . ." *Elmore v. State*, 15 Ga. App. 461, 462 (Ga. Ct. App. 1914). To paraphrase *Elmore*, opprobrious words tend to cause a breach of the peace if they are opprobrious; and, in further paraphrase, words which would tend to cause a breach of the peace are illegal because they would so tend. Lewis Carroll and *Alice in Wonderland* have nothing on this statutory gloss.

Convictions for "breach of the peace" where the offense was imprecisely defined were similarly reversed in *Edwards v. South Carolina*, 372 U.S. 229, 236-8, and *Cox v. Louisiana (I)*, 379 U.S. 536, 551-552. These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves open the standard of responsibility. It involves calculations of the boiling point of particular persons or groups, including perhaps a jury, rather than an appraisal of the nature of the comments *per se*. Cf. *Ashton v. Kentucky*, 384 U.S. 195, 200. See also, *University Committee to End the War v. Gunn*, 289 F.Supp. 469 (W.D. Tex. 1968), appeal dismissed *sub nom. Gunn v. University Committee*, 399 U.S. 383 (Texas breach of peace statute violates First Amendment rights); *Thomas v. City of Danville*, 207 Va. 656, 152 S.E. 265 (Va. S.Ct. App. 1967) (Restraining order in terms of disturbing or alarming the public violates First Amendment rights). Section 6303 does not solely forbid violent and menacing *conduct* or *conduct* which tends to provoke violent and menacing conduct; it weighs upon speech. Cf. *Wright v. City of Montgomery*, 406 F.2d 867 (5th Cir. 1969) (City disorderly conduct ordinance constitutional where construed to prohibit only violent and menacing conduct).

Whatever might be said about the specificity of the words "breach of the peace," the word "tending" makes the phrase hopelessly vague. If "with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned. . ." could not pass constitutional muster in *Cox v. Louisiana*, 379 U.S. 536, 551-52, the statute here can do no better. "Intent" is, after all, a word with well defined content in the criminal law; on the other hand, "tending" is anybody's guess.

As Mr. Justice Black stated recently:

> As pointed out in *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940), common law breach of peace is at its best a confusing offense that may imperil First Amendment rights. But how infinitely more doubtful and uncertain are the boundaries of an offense including any "diversion tending to a breach of the peace***"! *Gregory v. City of Chicago*, 394 U.S. 111, 119. (Black, J. concurring)[6]

In addition to the facial obscurity of the term "tend," a question arises as to whether the defendant will be held responsible for the conduct of others. Is one charged under the statute liable only for his remarks, or for the actions of the person to whom he addresses those remarks, or for the actions of others—either his consorts or those in opposition to him—or even, the police? The boundaries of the spectrum are unclear. Limiting freedom of expression because of the mere possibility of a violent reaction on the part of others is constitutionally forbidden. *Terminiello v. City of Chicago, supra*, at 4.

Another fatal flaw in the use of the word "tending" as the nexus between words and their result is the consequent elimination of the clear and present danger test.[7] In Ga.

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[6]The majority did not reach this question: Justices Harlan and Douglas noted their agreement with Mr. Justice Black on this point.

[7]"The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Wood v. Georgia*, 370 U.S. 375, 384. The Court notes that the clear

Code Ann. § 26-5304 (inciting to riot) the legislature linked the words with the result, using the language "a clear and present danger." Here they have not, although it has been fifty years since Mr. Justice Holmes' dictum in *Schenck v. United States*, 294 U.S. 17, 52.

The decision in *Stromberg v. California*, 283 U.S. 359 where it was held that conviction could not be had under the portion of a statute prohibiting the display of a "sign, symbol or emblem of opposition to organized government," 283 U.S. at 359, illustrates the vice of Section 6303. The Court recognized that the state could punish those "who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Id.* But since the prohibited display might lead only to peaceful opposition to the government, the statute could not stand. Certainly, though, the display of the symbol, if effective, could be said to have a *tendency* to cause violence—the jury may well decide.

The Supreme Court applied *Stromberg* in *Gregory v. City of Chicago, supra.* In his concurring opinion, Mr. Justice Black goes to some length to explain exactly why the *Stromberg* case "requires reversal," *id.* He notes that "[i]n explaining the elements of the offense to the jury, the trial judge merely read the language of the ordinance," as was done in *Stromberg.* 394 U.S. at 122. And, this is all that the criminal trial judge did here with regard to the breach of the peace element. Record, *Wilson v. State*, No. 24113, Georgia Supreme Court, 232, 235. But this was grossly insufficient guidance for the jury in light of the quantum of disruption allowed in such cases as *Cox v. Louisiana*, 375 U.S. 536 and *Edwards v. South Carolina*, 372 U.S. 229. Cf. *Coates v. City of Cincinnati, supra.*

In approving the use of the bare statutory language to instruct the jury on breach of the peace (and in holding that

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and present danger does not purport to mark the furthermost constitutional boundaries of protected expression.

the words were opprobrious *per se*), the court rejected every limitation relied on by the Supreme Court to sustain the New Hampshire Supreme Court's reading of the statute in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). Even under the assumption that *Chaplinsky* today retains its full vitality,[8] it cannot be of aid to the state here.

It is the vice of inadequate standards which allowed the jury to convict the petitioner of an offense which would ordinarily merge in the consumated battery. See *Rich v. State*, 160 Ga. 513, (Ga. S.Ct. 1925); *Jackson v. State*, 38 Ga. App. 138, (Ga. Ct. App. 1928); *Kennedy v. State*, 10 Ga. App. 794 (Ga. Ct. App. 1912). See also Ga. Code Ann. § 27-2508.

Although reformation of Section 6303 at this stage cannot serve as a basis for reinstating appellee's conviction, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, it is likely that its "breach of the peace" segment might be constitutional if "tending" were less vague. Cf. *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969) (*en banc*) at 646, positing a constitutional construction of the breach of peace statutes:

> "And for these purposes a breach of the peace is [constitutionally] threatened either because the language *creates a substantial risk* of provoking violence or because it is, under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear *as to amount to a nuisance.*" (Footnotes omitted; emphasis supplied).

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[8] Although there is no doubt that the state can punish "fighting words" this appears to be about all that is left of the decision in *Chaplinsky*. A number of cases substantially undermine the remainder of that opinion. See, *e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *NAACP v. Button*, 371 U.S. 415 (1963) (*i.e.* consideration of other possible applications of statute); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *Cf. Carroll v. President and Commissioners*, 393 U.S. 175 (1968).

The proposed Model Penal Code likewise would make certain disorderly conduct illegal if it *creates* a public annoyance,[9] but not if it only has that *tendency*. Model Penal Code § 250.2 (Proposed Official Draft, 1962); *Williams v. District of Columbia, supra,* 419 F.2d at 646-7 n. 25.

A statute which depends upon tendencies must of necessity sweep in a great variety of conduct, *Cantwell v. Connecticut,* 310 U.S. 296, 308, and as such must in turn be subject to a "heckler's veto" that is inconsistent with notions of due process and the First Amendment. *Terminiello v. City of Chicago, supra; Gregory v. City of Chicago, supra.* Just as one man's vulgarity is another's lyric, *Cohen v. California, supra,* 91 S.Ct. at 1788, so too is one man's tending to cause a breach of the peace another's stout language or vigorous criticism. The result can only be that hallmark of vagueness, total uncertainty in application.

That appellee's conviction was obtained through the vagueness of the statute can be readily seen by an examination of the facts. Any tendency on the part of the words involved to cause a breach of the peace was immediately subsumed by the battery upon the police officer. In neither battery was there any time interval between petitioner's words and the battery. Nor is there any indication in the record that the words were broadcast to a wide range of the public or the police. The only person to hear the words, in each case, was a police officer *already* in actual physical contact with petitioner.[10]

Only a vague statute could give rise to a conviction where there was never any physical disengagement so as to render the language in any way distinct from its consequences. To say, "Let go of me immediately or I will strike you," can

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[9]The Model Penal Code antedates *Coates v. City of Cincinnati, supra.*

[10]The Model Penal Code excludes police from those whose "peace and quiet" may be disturbed. Model Penal Code § 250.1, comment at pp. 13, 17 (Tent. Draft No. 13, 1961).

be seen, realistically, in no other way than as a threat of direct physical consequence. Indeed, under Georgia law, such words themselves are an assault. If the addition of a few stray profanities can render the verbal assault a new, separate, and distinct offense it is only because the statute which creates the offense is unconstitutionally sweeping, broad and vague.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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